FAO No. 248 of 2006.

19.6.2007. Present: Mr. G.R. Palsara, Advocate, for the appellant.

Mr. M.S. Guleria, Advocate, for the respondents.

The appellant has preferred this appeal against the judgment of the learned Fast Track Court, Mandi, H.P., remanding the case to the Trial Court after framing additional issue.

Brief facts of the case are that the appellant who was the plaintiff before the learned Trial Court, instituted a suit for permanent prohibitory and mandatory injunction against the defendants on the allegations made in the suit. The learned Trial Court decreed the suit and held as under:-

> "Cumulative effect of all the discussions made above and conclusion arrived at supra is that suit of the plaintiff succeeds and it is decreed. The defendants are hereby restrained by permanent prohibitory injunction from interfering over the land comprised under khewat khatauni No. 124/136, khasra No. 943 measuring 3-0-0 bighas, situated in muhal Tandi No. H.B. 2 Tehsil Chachiot Distt. Mandi. Plaintiff is also entitled for relief of mandatory injunction. Defendants are directed to demolish the cow-shed over the suit land to the extent of -0-0-12 bighas bearing khasra No. 943/1 and encroached portion of the suit land is ordered to be restored to its original vacant position, and possession be handed over to the plaintiff"

An appeal was preferred before the learned Fast Tract Court who vide judgment and order in appeal remanded the case to the

Trial Court for trial afresh in accordance with law after framing the following issue:

> "Issue No. 5-A: Whether the defendants have become owners of the suit land by way of adverse possession? OPD"

I have heard learned counsel for the parties and gone through the record. The Appellate Court's judgment cannot be sustained. The learned Appellate Court is wrong in holding that as no issue was framed by the Trial Court as to whether the plaintiff is entitled to possession of the suit land or not and that the parties were not put to trial on such issue prior to the passing of the decree for possession in favour of the plaintiff, Issue No. 5-A has been framed in order to ascertain as to whether the defendants have become owner of the suit land by way of adverse possession. The discussion with respect to the possession is contained in para 11 of the judgment of the learned Trial Court where as a fact, this question has been determined including the question of adverse possession. It is by now well settled that a remand cannot be made merely because no issue has been framed. Surely, if the evidence regarding the possession of the parties to the suit is otherwise on record and can be used for determining the controversy between the parties, there is no necessity of remanding the case. Order 41 Rule 24 of the Code of Civil Procedure is clear that where the evidence on the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determining the suit, notwithstanding that the judgment of the Court from whose decree the

appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

Provisions of Order 41 Rule 24 are not attracted to the facts of the case. Even if fresh issue is to be framed only a finding on that can be called for after recording additional evidence. The entire judgment cannot be set aside. As I have held that the learned Trial Court has dealt with the question of possession in its judgment. Whether the possession is adverse or not or which of the parties is entitled to possession will be a matter which can be considered by the Appellate Court. In the facts and circumstances of this case, this appeal is allowed. The judgment of the Appellate Court is aside and it will proceed afresh with the matter in accordance with law. All interim orders shall stand vacated and all the applications shall stands disposed of. There shall be no orders as to costs.

19th June, 2007. **(Dev Darshan Sud),**
(cm) **Judge.**